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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

KENNETH B. SAWATZKY,

Petitioner,

—v.—

CITY OF OKLAHOMA CITY,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO
THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether the First Amendment permits the state to criminalize all solicitations of private, non-commercial sexual activity between unmarried and consenting adults based on an asserted interest in protecting listeners from speech that the state has deemed "not appropriate in public places"?

2. Whether the court below erred, as a matter of First Amendment law, by proceeding on the assumption that petitioner could validly be convicted for solicitation even if the underlying conduct he solicited was entitled to protection under either the state or federal constitutions?

PARTIES TO THE PROCEEDING BELOW

The caption of the case includes the names of all parties.

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OPINIONS BELOW

The decision of the Court of Criminal Appeals of the State of Oklahoma is reported at 906 P.2d 785 (Okla. Crim. App. 1995), and is reprinted in the appendix. (App. 1a). There is no written opinion associated with petitioner's conviction and sentencing in the Oklahoma City Municipal Court, nor is there a written opinion reflecting that court's denial of petitioner's motion to dismiss. The trial court's one-sentence oral ruling denying the motion to dismiss is unreported.

JURISDICTION

The Court of Criminal Appeals of the State of Oklahoma, the state court of last resort in criminal cases, issued its decision on November 21, 1995. That decision affirmed petitioner's conviction and sentence in municipal court for "Offering to Engage in An Act of Lewdness."

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Section 30-152(a) of the Oklahoma City Municipal Code provides:

> No person shall engage in or offer to engage in any act of prostitution or other act of lewdness or to solicit, induce, entice, or procure another to commit or engage in any act of prostitution or other act of lewdness.

As used therein, "lewdness" means:

a. any lascivious, lustful or licentious conduct,

b. the giving or receiving of the body for indiscriminate sexual intercourse, fellatio, cunnilingus, masturbation, anal intercourse, or lascivious, lustful or licentious conduct with any person not his or her spouse, or

c. any act in furtherance of such conduct or any appointment or engagement for prostitution[.]

Oklahoma City Municipal Code §30-151(1).

STATEMENT OF THE CASE

Factual Background

On July 6, 1994, petitioner Kenneth B. Sawatzky visited an area known as Hobie Point, a peninsula of land that reaches into Lake Hefner in Oklahoma City. This public park includes a beach and paths through wooded groves, and is designed for the public's enjoyment of the out-of-doors. (Nov. 14., 1994, Trial Transcript ("Tr. Trans.") 97-100).

While walking down a secluded dirt roadway, *id.* at 106, Mr. Sawatzky encountered a man later identified as Officer Raymond A. Ledford of the Oklahoma City Police Department, who was on undercover duty. Officer Ledford, dressed in jeans and a tank top, was leaning against a parked car and smoking a cigarette. *Id.* at 104, 107. Mr. Sawatzky asked Officer Ledford for a cigarette and the two men struck up a conversation. *Id.* at 107-08.

Officer Ledford pretended to be a construction foreman visiting from Kansas City. He told Mr. Sawatzky that he

was staying at the Holiday Inn on 39th Street. *Id.* at 110. He also told Mr. Sawatzky that he had heard of Hobie Point at a bar near "39th and Penn," a predominantly gay area of Oklahoma City. *Id.* at 108, 115. Officer Ledford asked Mr. Sawatzky if he was a police officer and appeared to be nervous about a potential police presence at Hobie Point. *Id.* at 108-09. All of Officer Ledford's remarks were designed to put Mr. Sawatzky at ease and to indicate receptivity to a "homosexual proposal." *Id.* at 115-28.

Mr. Sawatzky eventually asked whether he could go to the other man's hotel room to take a shower; he received an affirmative reply. *Id.* at 111. The two men then walked to Mr. Sawatzky's car. At the car, the officer asked Mr. Sawatzky "what he liked." *Id.* at 113. Mr. Sawatzky did not reply with any specifics when first asked this question, but on a second asking said: "I want to suck a dick." *Id.* at 113, 128. Officer Ledford responded that "I had a dick for him" and reached into his pocket to pull out his badge. *Id.* at 114-15. Mr. Sawatzky was arrested and charged with "offering to engage in an act of lewdness," as prohibited by Oklahoma City Municipal Code Sections 30-152 and 30-151.

Proceedings In The Oklahoma Courts

1. On July 27, 1994, Mr. Sawatzky moved to dismiss the charge against him. He argued that his conversation could not be punished unless it constituted an offer or solicitation of an *unlawful* act and that fellatio between two men could not -- under the Oklahoma Constitution's right to privacy, the state and federal constitutional rights to equal protection, and the state and federal prohibitions against establishment of religion -- be made unlawful. (Sept. 1, 1994, Motion Hearing Transcript ("Mot. Trans.") 6-7; Aug. 30, 1994, Defendant's Memorandum In Support Of Motion To

Dismiss 1-2).[1] Mr. Sawatzky's counsel emphasized that "if you may commit these acts in the privacy of your own home or in a motel room as alleged in the information, then you certainly have the constitutional right to ask someone to commit these consensual acts." (Mot. Trans. 7). The city did not dispute that proposition; rather, it argued that the underlying "lewd" acts were validly proscribed. *Id.* at 17-21. The municipal court, ruling without explanation from the bench, denied the motion to dismiss. *Id.* at 23.

2. Mr. Sawatzky was tried before a jury on November 14, 1994. In response to defense motions after the state's case, the municipal court indicated that it "did not desire to revisit" Mr. Sawatzky's constitutional challenges, including his underlying claim of "violation of First Amendment protection . . . of free speech." (Tr. Trans. 126-27). The jury rendered a guilty verdict and recommended punishment of a $250 fine. *Id.* at 176. On December 1, 1994, the court imposed the sentence recommended by the jury.

3. On December 8, 1994, Mr. Sawatzky filed a timely Notice Of Intent To Appeal to the Oklahoma Court of Criminal Appeals. In that court, he renewed his arguments that the state could not constitutionally punish private, consensual, non-commercial sexual acts between two men and that therefore his conviction for "offering" such an act should be overturned. Mr. Sawatzky again invoked the Oklahoma Constitution's right to privacy, the state and federal constitutional rights to equal protection, and the Oklahoma Constitution's prohibition against establishment of religion to contest the government's power to make private

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[1] The Oklahoma Court of Criminal Appeals had earlier held that heterosexuals could not be criminally punished for private, consensual, non-commercial sodomy. *Post v. State*, 715 P.2d 1105, 1109 (Okla.Crim. App.)("the right to privacy . . . includes the right to select consensual adult sexual partners"), *cert. denied*, 479 U.S. 890 (1986).

same-sex sexual acts unlawful. (Appellant's April 28, 1995, brief in Accelerated Docket format).

In response, the government disputed Mr. Sawatzky's reading of prior cases and contested the factual foundation for his equal protection and establishment of religion claims. The government did not, however, offer any affirmative statement of a purportedly valid state interest that it sought to serve in prosecuting Mr. Sawatzky. (Appellee's June 26, 1995, brief in Accelerated Docket format).

The court of criminal appeals refused to address Mr. Sawatzky's constitutional objections to the criminalization of private same-sex sodomy, which he argued would then void his conviction based on a verbal offer to participate in such conduct.[2] The court took the position that,

> [t]his case is neither about the regulation of conduct between consenting adults in the privacy of their bedrooms, nor the legal status to be provided to homosexual persons. Fundamentally, this case is about whether Oklahoma City may legally prohibit *public solicitations* for private non-commercial acts of sodomy.

(App. 1a-2a)(emphasis added).

The court of criminal appeals decided that it need only review Mr. Sawatzky's conviction under a rational basis standard. The court then hypothesized for Oklahoma City a "legitimate governmental interest" in "protect[ing] persons from being asked by others to engage in sexual activity."

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[2] The court of criminal appeals explicitly declined to rule on whether the state constitutional right to privacy protects "private non-commercial sodomy between consenting adults of the same gender" (App. 2a), and on whether homosexuals and heterosexuals, in light of the right to equal protection, must be treated alike for purposes of the criminal punishment of sexual behavior. (App. 3a).

(App. 4a). The court acknowledged that its newly conceived purpose for a public solicitation ban "implicates . . . the First Amendment right to free speech." (App. 4a n.7). It also noted, in a nod to Mr. Sawatzky's arguments, that "it is generally recognized that government should not prohibit the solicitation of conduct that is not unlawful." *Id.* Ultimately, however, the court concluded:

> In our view, reasonable prohibitions against soliciting sexual acts do not violate the First Amendment whether the underlying conduct is lawful or unlawful. Our view is based upon the unique status of sexual conduct in our culture. In our community, some forms of overt sexual conduct, including the solicitation of some sexual acts, [are] simply not appropriate in public places. To suggest that government cannot prohibit such solicitation is unfathomable.

Id. On this reasoning, the court upheld Mr. Sawatzky's conviction.[3]

Thus, the first federal question on which petitioner seeks review is timely and properly raised here in the first instance, because only with the court of criminal appeals decision was the notion of protecting listeners from "inappro-

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[3] The court below also explained the marital exception to §30-152 by concluding, "We are of the opinion that within the marital relationship the parties to the relationship impliedly consent to sexual solicitations (not sexual acts) and, thus, the City's exception of married persons is entirely reasonable and rationally related to the purposes of the ordinances." (App. 5a n.8).

Judge Strubhar, in dissent, stressed that Mr. Sawatzky's offer clearly was not "made under circumstances which could reasonably have been perceived to have been offensive" and thus, that the court's reasoning did not fit the facts of Mr. Sawatzky's as-applied challenge.

priate" public speech introduced into this case. The argument that the legality or illegality of the underlying conduct necessarily determines the constitutionality of this solicitation offense has been timely and properly raised at every stage of the state court proceedings.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ and address the important First Amendment issues posed by this case for at least three reasons. First, in relying upon the presumed sensibilities of potential listeners to outlaw speech on an "inappropriate" subject for public discussion, the court below violated a core First Amendment principle and ignored numerous contrary decisions of this Court. Second, the court's ruling created a substantial overbreadth problem, for its purportedly legitimate government purpose does not come close to justifying the extremely broad sweep of Oklahoma City's solicitation offense. Third, these errors were made with regard to a type of speech -- an offer to participate in private, consensual sexual activity -- that has confused the lower courts, causing a split among state courts of last resort in their analysis of the First Amendment's application to such speech. Thus, a decision from this Court could not only correct significant federal constitutional missteps in Mr. Sawatzky's case, but could also provide needed clarification for the many state court judges reviewing similar prosecutions throughout the country.

Two issues *not* contested by Mr. Sawatzky also bear summarizing at the outset. Petitioner does not dispute the well-established proposition that the solicitation of criminal activity is unprotected by the First Amendment, provided of course that the conduct solicited is validly outlawed. *See, e.g., Konigsberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961) ("solicitation of crime" outside protection of First Amendment). Indeed, Mr. Sawatzky has emphasized throughout

this litigation that the critical determination is whether or not the underlying sexual activity can validly be proscribed and that the Oklahoma court erred by failing to make that determination in the first instance. Petitioner also does not challenge the ability of government to enact content-neutral criminal provisions that outlaw harassment, provided those statutes require a perpetrator to do more than simply approach or annoy another.

By contrast, what the Oklahoma Court of Criminal Appeals was left with in this case -- after explicitly disengaging the punishment of Mr. Sawatzky's expression from any possible justification based on the criminal nature of the conduct solicited -- was a bare content-based limitation on speech. Oklahoma City's ordinance triggers punishment whenever a particular message, an offer to participate in certain sexual acts, has been expressed.[4] Once any tie to the underlying criminalized conduct is set aside, as the court below did, such a content-based burden on speech is presumptively unconstitutional and can be upheld only if it is narrowly tailored to serve a compelling state interest. *See Simon & Schuster, Inc. v. Members of the New York Crime Victims Board*, 502 U.S. 105, 115, 118 (1991). Yet Oklahoma City did not even attempt to satisfy that exacting standard (*see* Appellee's June 26, 1995, brief), nor could it have. Instead, the court of appeals itself devised an *impermissible* government purpose and found that purpose wholly sufficient to justify Mr. Sawatzky's punishment.

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[4] Not only the explicit language of the ordinance, but also the reasoning below shows that Mr. Sawatzky's conviction was based upon the substantive content of his statement to Officer Ledford, and not based in any part on the manner in which the offer was communicated. The court of criminal appeals reasoned that "the unique status of sexual conduct in our culture" made offers relating to that topic "simply not appropriate in public places" (App. 4a n.7); never in the opinion did it even mention the actual words Mr. Sawatzky used to express his solicitation.

I. THE HOLDING BELOW CONTRADICTS PRIOR DECISIONS OF THIS COURT ON A CENTRAL FIRST AMENDMENT PRINCIPLE AND CREATES A SUBSTANTIAL OVERBREADTH PROBLEM

A. Protecting Listeners From One, Disfavored Category Of Speech On The Basis Of Content Is Not A Legitimate State Interest

The Oklahoma Court of Criminal Appeals wrongly concluded that protecting possible listeners from an "inappropriate" or taboo message constitutes a "legitimate governmental interest." (App. 4a). As this Court wrote in *Texas v. Johnson*, 491 U.S. 397 (1989), supporting the proposition with citation to thirteen prior cases, the very premise of the First Amendment is that government can never act based upon the "objectionable" nature of speech content: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414.

Far from relying exclusively on such an interest to justify the punishment of speech, as the decision below approved, government must "disclaim[] . . . any state interest in suppress[ion] . . . out of solicitude for the sensibilities of" those who might hear the disfavored message in order to have any chance of complying with the First Amendment. *Simon & Schuster v. Crime Victims Board*, 502 U.S. at 118 (emphasis added). In *Simon & Schuster*, this Court emphasized that "'[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'" *Id.* (quoting *Hustler Magazine v. Falwell*, 485 U.S.

46, 55 (1988), which in turn quotes *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978)).

This "bedrock" First Amendment principle applies equally to expression that relates to sexual behavior or contains sexually charged images, provided that the expression is not obscene. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989)("[s]exual expression which is indecent but not obscene is protected by the First Amendment" and cannot be criminalized for an adult audience simply because it is deemed "indecent"); *see also Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 70-71 (1983).

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975), for example, the city sought to ban films containing nudity from drive-in movie screens, arguing that government "may protect its citizens against unwilling exposure to materials that may be offensive." The Court disagreed:

> Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.

Id. at 210. The *Erznoznik* decision -- though noting that in "narrow circumstances," such as the home, there might be cognizable privacy interests -- underscored that the normal and easy recourse for any offended viewer is simply "to 'avoid further bombardment of [his] sensibilities by averting [his] eyes.'" *Id.* at 210-11 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

Similarly, in *Cohen*, the Court overturned a criminal conviction for "disturbing the peace by offensive conduct."

See 403 U.S. at 16. Cohen had worn a jacket with "Fuck the Draft" written on it while in the Los Angeles County Courthouse. This Court strongly rejected any contention that Cohen's punishment could be based upon "the substantive message" his expression conveyed. *Id.* at 19. Furthermore, the Court wrote that "'so long as the means are peaceful, the communication need not meet standards of acceptability'" and that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Id.* at 25-26 (citation omitted).

Especially in a public setting, the Court put the burden on unwilling and offended recipients to remove their eyes or ears from disquieting expression, and refused to allow the government to outlaw "offensive" speech to protect listeners. Indeed, the Court in *Cohen* used the example of "strolling through Central Park" as the quintessential public setting where a citizen could have no constitutionally legitimate expectation of government protection from unwanted and unsettling communication. *Id.* at 21.

Here, Mr. Sawatzky has been criminally prosecuted for his conversation with another adult in a public park. The court of criminal appeals upheld his conviction based solely on its conclusions that sexual propositions are "inappropriate" in public places and that government can legitimately seek to "protect" listeners from such expression.

That decision represents a fundamental misunderstanding of the First Amendment. *See, e.g., Simon & Schuster v. Crime Victims Board*, 502 U.S. 105; *Texas v. Johnson*, 491 U.S. 397; *Erznoznik v. Jacksonville*, 422 U.S. 205; and *Cohen v. California*, 403 U.S. 15. Petitioner respectfully submits that the writ should issue to correct this state high court's significant error, which not only affects Mr. Sawatzky but also will affect the many other individuals who

are arrested in the future under Oklahoma City's ordinance and under similar laws in other cities and states.[5]

B. Even Assuming *Arguendo* That Protecting Recipients From Unwanted Public Sexual Offers Constitutes A Valid Government Interest, This Ordinance Is An Unconstitutionally Overbroad Means Of Serving Such An Interest

The Oklahoma Court of Criminal Appeals reasoned that "this case is about whether Oklahoma City may legally prohibit public solicitations for private non-commercial acts of sodomy." The court concluded -- in violation of the First Amendment, *see* Point IA, *supra* -- that the city could do so to "protect" its citizens from unwanted and "inappropriate" public sexual offers. Such a characterization of the Oklahoma City ordinance renders it substantially overbroad and makes Mr. Sawatzky's punishment under the statute unconstitutional, even if the asserted government interest were legitimate.

Contrary to the purported aim of the ordinance, the language of the provision does not limit punishment to solicitations that take place in public. Rather, *any* conversation, no matter how private, that includes an offer to participate in any "indiscriminate sexual intercourse, fellatio, cunnilingus, masturbation, anal intercourse, or lascivious, lustful or licentious conduct with any person not" the speaker's spouse is swept within this law and is subject to criminal punishment. Likewise, there is no requirement in the ordinance that a sexual offer be unwanted, be thought "inappropriate" by the

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[5] As the record in this case shows, Oklahoma City police regularly patrol Hobie Point with the goal of arresting individuals who, in the course of conversations with undercover officers, make sexual propositions. (Tr. Trans. 101).

recipient, or be lewd itself before the arm of the state steps in. A welcomed, decorous proposal to engage in lawful, common sexual activity from one member of a long-standing (but unmarried) couple to the other, in the privacy of their own home, is as unlawful here as a public, loud and vulgar offer shouted to a repulsed stranger in a singles bar. Mr. Sawatzky's own situation illustrates that a solicitation can be strongly encouraged by the recipient and still trigger prosecution, though it has neither surprised nor offended anyone.

Like the ordinance ruled unconstitutionally overbroad in *City of Houston v. Hill*, 482 U.S. 451 (1987), this provision "criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily . . . yet only some individuals -- those chosen by the police in their unguided discretion -- are arrested." *Id.* at 466-67. Moreover, as in *Houston v. Hill* and *Erznoznik v. Jacksonville*, 422 U.S. at 212-15, much of the protected speech that is outlawed by this ordinance bears no relationship to the purported goal of the measure. Such an ordinance "plainly is insufficiently related to the governmental interests asserted in its support to justify its interference with protected speech" and should be struck down on its face. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 639 (1980).

The court of criminal appeals ruling, therefore, warrants review and correction on this score as well. In attempting to sidestep the critical issue of whether or not the underlying sexual act offered in this case is constitutionally proscribable in Oklahoma, the state court not only turned to an impermissible government interest, but also created a basis for facially striking the law due to its substantial overbreadth.

II. THE DECISION BELOW AND THE ANALYSIS OF OFFERS TO PARTICIPATE IN SEXUAL ACTS BY OTHER STATE COURTS HAVE CREATED A CONFUSING PATCHWORK OF RULINGS ON THE IMPORTANT FREE SPEECH ISSUES INVOLVED

The prevalent type of arrest at issue here has engendered much doctrinal confusion in the state courts, providing another ground for granting the writ. State courts have treated offers to participate in sexual acts in at least three different ways. First, as in this case, some courts have simply acceded to a government interest in shielding the sensibilities of potential recipients, despite that interest's illegitimacy, *see* Point IA, *supra*. Second, the courts in Ohio have improperly labelled sexual solicitations "fighting words" and thereby excluded them from the First Amendment's protection. *See, e.g., State v. Phipps*, 389 N.E.2d 1128 (Ohio 1979); *State v. Presley*, 612 N.E.2d 353 (Ohio Ct.App. 1992). Third, other courts have correctly struck down offenses that punish offers of lawful sexual activity or limited punishment to the solicitation of unlawful acts.[6] *See, e.g., State v. Neal*, 500 So. 2d 374 (La. 1987); *Commonwealth v. Sefranka*, 414 N.E.2d 602 (Mass. 1980). Even within the

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[6] This result recognizes that solicitations to commit a crime are a "categorical" exception to the First Amendment and not generally protected thereby, while at the same time recognizing that other sexual solicitations, inviting lawful activity, constitute protected expression and cannot constitutionally be subject to content-based regulation by the state.

If the third, proper approach had been followed in this case, the Oklahoma Court of Criminal Appeals would have proceeded to decide whether same-sex fellatio could be constitutionally prohibited in Oklahoma -- particularly under the Oklahoma state constitutional right to privacy and under the state and federal rights to equal protection -- and then, based upon the result of that analysis, either overturned or upheld Mr. Sawatzky's conviction.

third group, however, the reasoning of some state high courts muddies the governing First Amendment rules, *see, e.g., State v. Uplinger*, 447 N.E.2d 62 (N.Y.), *cert. granted*, 464 U.S. 812 (1983), *cert. dismissed*, 467 U.S. 246 (1984); *Pryor v. Municipal Court*, 599 P.2d 636 (Cal. 1979); or ignores the freedom of expression aspect of solicitation cases entirely, *see, e.g., Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). Such disparate outcomes, corrosive of the First Amendment's proper meaning, signal the need for new guidance from this Court.

In *Phipps*, for example, the Ohio Supreme Court began by making the same mistake as the Oklahoma court below, finding it "a legitimate exercise of the police power" to protect citizens from the "injurious" emotional impact of "homosexual solicitations." 389 N.E.2d at 1133. The *Phipps* opinion reasoned that, contrary to core First Amendment doctrine,

> [i]t is beyond cavil that this is a legitimate exercise of the police power . . . . Those who would have this court believe that the average citizen would not find homosexual solicitation of the nature proscribed . . . to be injuriously offensive are guilty of murky thinking. The type of expression proscribed in the statute may have been acceptable in a more barbarous age when human dignity had not reached the level expected by citizens in our modern society.

389 N.E.2d at 1133.[7]

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[7] Even in *Uplinger* -- a case in which the New York Court of Appeals reached the right result and overturned a conviction for loitering-to-solicit consensual sodomy because the underlying sodomy statute had been (continued...)

The Ohio court recognized, however, the difficulties posed by this Court's rulings in such cases as *Cohen*. *See* 389 N.E.2d at 1133. It ultimately construed the requirement that "[n]o person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard," Ohio Rev. Code §2907.07 (B), to cover "fighting words" and thus to be constitutional. In terming a sexual offer that might be "grossly offensive and emotionally disturbing" "fighting words," 389 N.E.2d at 1134, *Phipps* impermissibly expanded and distorted the extremely narrow "fighting words" concept. *See Gooding v. Wilson*, 405 U.S. 518, 527 (1972)(striking down purported "fighting words" definition that "makes it a 'breach of the peace' merely to speak words offensive to some who hear them"). The *Phipps* holding, as the dissent there wrote, "seriously blurs the long-standing distinction between fighting words and merely offensive speech." 389 N.E.2d at 1135 (Sweeney, J., dissenting).[8]

Some state courts have avoided the traps of viewing sexual offers as "offensive" overtures citizens need protec-

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[7] (...continued)
struck down as unconstitutional in another case -- the court incorrectly hinted that if the offense had required that the sexual offer be "in any way offensive or annoying to others," that fact might have allowed such prosecutions to continue, despite the lawfulness of the underlying act offered. 447 N.E.2d at 63.

[8] Prosecutions punishing sexual solicitations as "fighting words" continue to be upheld by the Ohio courts. *See, e.g., Presley*, 612 N.E.2d at 354 (same-sex sexual offer found to be "grossly offensive and emotionally disturbing"; "average person would be provoked to a breach of the peace by such words"). *See also Pryor*, 599 P.2d at 646 n.11 (incorrectly intimating that a public solicitation for a private lawful sexual act could be punished where its "offensive words" were "inherently likely to provoke an immediate violent reaction").

tion against or as "fighting words." Those courts have properly tied the government's ability to prohibit sexual solicitations to whether or not the solicited act is itself unlawful. As the Virginia Supreme Court held, an ordinance outlawing solicitations of "lewd, lascivious, [and] indecent" acts must, to save it from First Amendment infirmity, "be narrowly construed to proscribe the solicitation of only those acts which, if consummated, would constitute criminal offenses . . . . First Amendment protection is not afforded statements made in the solicitation of criminal acts." *Pedersen v. City of Richmond*, 254 S.E.2d 95, 98 (Va. 1979).[9] If a solicitation statute cannot be so construed by the state's judiciary, it must be declared void. *State v. Tusek*, 630 P.2d 892, 894-95 (Or.Ct.App. 1981)(the challenged "accosting" statute "makes it a crime to ask another person to participate in an act which is not itself a crime" and is not susceptible to another construction; it "prohibits speech that comes within the . . . First Amendment . . . [and] is therefore void").[10]

In this case, though, the Oklahoma Court of Criminal Appeals joined the ranks of the state courts that "have struggled with this problem," (App. 4a n.7), and that have

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[9] *See also Sefranka*, 414 N.E.2d at 608 ("by limiting the speech proscribed to the solicitation of particular public sexual conduct which is itself criminal, the construed provision does not reach speech protected by the First Amendment"); *Pryor*, 599 P.2d at 646. The Louisiana Supreme Court, in *Neal*, upheld a statute prohibiting solicitation for the "crime against nature" under the related, but not exactly pertinent, standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See* 500 So. 2d at 377-78 ("[t]he offender's conduct and speech are directed to inciting or producing [the] imminent lawless act[] of . . . crime against nature").

[10] *See also Uplinger*, 447 N.E.2d at 63 ("Inasmuch as the conduct ultimately contemplated by the [loitering-for-purposes-of-solicitation] statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose"; statute was "aimed at proscribing overtures . . . leading to what" now is a lawful act).

analyzed solicitation prosecutions in ways that violate the First Amendment. The Court should grant the writ to clarify the governing federal constitutional rules for those state courts.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted and this case should be set for a full hearing by the Court. In the alternative, *certiorari* should be granted and the decision below summarily reversed, sending the case back to the Oklahoma Court of Criminal Appeals for further proceedings.

Respectfully submitted,

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Dated: February 12, 1996

APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KENNETH B. SAWATZKY,	)	
	)	
Appellant,	)	FOR PUBLICATION
	)	
v.	)	No. M-94-1309
	)	
THE CITY OF OKLAHOMA CITY,	)	
	)	
Appellee.	)	

OPINION

CHAPEL, V.P.J.:

Kenneth B. Sawatzky was found guilty by a jury on November 14, 1994, of Offering to Engage in an Act of Lewdness in violation of Oklahoma City Municipal Code 1993, Chapter 30, Section 30-152, in Oklahoma City Municipal Court, Case No. 94-4237631. Sawatzky was formally sentenced on December 1, 1994. He was fined $250.00 and ordered to pay $105.00 in court costs. Sawatzky applied to place his appeal on the Accelerated Docket of this Court pursuant to Rule 11.3 of the *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S.Supp.1995, Ch. 18, App. The appeal was thereafter assigned to the Accelerated Docket. On February 13, 1995, Sawatzky filed a Motion for Removal from the Accelerated Docket that was subsequently denied.

This case is neither about the regulation of conduct - between consenting adults in the privacy of their bedrooms, nor the legal status to be provided to homosexual persons.

Fundamentally, this case is about whether Oklahoma City may legally prohibit public solicitations for private non-commercial acts of sodomy. Sawatzky solicited an act of lewdness[1] in a public place from a police officer. The act solicited was intended to take place in private and Sawatzky and the officer are members of the same gender. In this context it is clear that Sawatzky is not entitled to relief.

In his first proposition of error Sawatzky claims that Sections 30-151 and 30-152 violate his right to privacy as guaranteed under the Oklahoma Constitution. This Court has yet to reach the question of whether the right to privacy extends to private non-commercial sodomy between consenting adults of the same gender,[2] and the United States Su-

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[1] Oklahoma City defines lewdness as:

> a. any lascivious, lustful or licentious conduct,
>
> b. the giving or receiving of the body for indiscriminate sexual intercourse, fellatio, cunnilingus, masturbation, anal intercourse, or lascivious, lustful or licentious conduct with any person not his or her spouse, or
>
> c. any act in furtherance of such conduct or any appointment or engagement for prostitution.

Oklahoma City Municipal Code 1993, Chapter 30, § 30-151. This definition may be overbroad from a constitutional standpoint. In addition to proscribing acts of sodomy it also proscribes vaginal intercourse and masturbation. However, this Court addresses only the fellatio portion of this definition, clearly an act of sodomy, because it is the only portion implicated by the facts of this case and because Sawatzky failed to attack the ordinance as overbroad.

[2] *Post v. State*, 715 P.2d 1105, 1110 (Okl.Cr.), *cert. denied*, 479 U.S. 890, 107 S.Ct. 290, 93 L.Ed.2d 264 (1986)("We do not reach the question of homosexuality since the application of the statute to such conduct is not an issue in this case. Our holding today is simply to declare unconstitutional the application of section 886 to the facts of this case."). For a thorough discussion of Oklahoma's sodomy jurisprudence, *see* (continued...)

preme Court has expressly refused to extend the equivalent right under the federal constitution to individuals who engage in such conduct.[3] We decline to reach the issue here because this case involves a public solicitation and nothing more.

In his second and third propositions Sawatzky claims that Sections 30-151 and 30-152 violate his right to equal protection. The second proposition is based on the state constitution and the third proposition is based on the federal constitution. The right to equal protection guaranteed under Oklahoma's Constitution has consistently been interpreted as coextensive with the right to equal protection guaranteed under the federal constitution.[4] Consequently, we address these propositions together.

Sawatzky invites this Court in his second and third propositions to determine whether same sex adults may lawfully engage in private non-commercial consensual sodomy. We declined to reach this issue in *Post* because the facts of that case did not warrant such a determination.[5] Likewise, the facts of Sawatzky's case do not warrant a determination of this issue and we do not address it.

This case involves a public solicitation for acts defined

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[2] (...continued)
Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 Am J. Crim. L. 37 (1993).

[3] *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).

[4] *Callaway v. City of Edmond*, 791 P.2d 104, 106 n.1 (Okl.Cr. 1990) ("Our due process clause in Art. 2 Sec. 7, Okl. Const., has a definitional range that is coextensive with its federal counterpart . . . .").

[5] *Post*, 715 P.2d at 1110.

by Oklahoma City as lewd under Section 30-151. Section 30-151(1)(b),[6] creates an exception for married persons in the definition of lewdness. The married person exception is the only distinction between groups contained in the text of Sections 30-151 and 30-152. Because Sawatzky is not a member of a suspect or quasi-suspect class, we will examine Sawatzky's equal protection claim under the rational basis test. Among other things Sections 30-151 and 30-152 are designed to protect persons from being asked by others to engage in sexual activity. Protecting citizens from solicitations for sexual acts is a legitimate governmental interest.[7]

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[6] "[T]he giving or receiving of the body for indiscriminate sexual intercourse, fellatio, cunnilingus, masturbation, anal intercourse, or lascivious, lustful or licentious conduct *with any person not his or her spouse*[.]" (emphasis added). Although the dissent seems to indicate that a married person would be permitted under the statute to publicly solicit any person for the purpose of engaging in private non-commercial consensual sodomy, this is clearly not the case. The married person exception applies only to solicitations made by persons who are married to each other.

[7] We are aware that our holding implicates other constitutional provisions including the First Amendment right to free speech. The free speech issue is significant and cannot be ignored even though we are declining, in this case, to decide whether or not same sex sodomy is lawful. The issue arises because it is generally recognized that government should not prohibit the solicitation of conduct that is not unlawful. Other courts have struggled with this problem and have reached to resolve the issue with questionable application of existing rationales such as the "fighting words" doctrine. *State v. Phipps*, 389 N.E.2d 1128, 1133-34 (Ohio 1979). In our view, reasonable prohibitions against soliciting sexual acts do not violate the First Amendment whether the underlying conduct is lawful or unlawful. Our view is based upon the unique status of sexual conduct in our culture. In our community, some forms of overt sexual conduct, including the solicitation of some sexual acts, is simply not appropriate in public places. To suggest that government cannot prohibit such solicitation is unfathomable. Of course, equally pernicious are those laws which go too far in trying to regulate

(continued...)

The distinction found in Section 30-151, exempting married persons from the definition of lewdness, logically recognizes that such solicitations may be a consequence of the marital relationship.[8] Therefore, we hold that the married person exception is rationally related to a legitimate governmental interest and does not violate the right to equal protection guaranteed by the Oklahoma and federal constitutions.[9]

In his final proposition of error Sawatzky contends that Sections 30-151 and 30-152 violate his rights under Article I, Section 2 of the Oklahoma Constitution. Essentially Sawatzky's claim is that Sections 30-151 and 30-152 are impermissibly founded on religious beliefs in violation of the establishment clause. This claim is unsupported by the record and is denied.

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[7] (...continued)
our private activities. As noted above, the ordinances in question, §§ 30-151 and 30-152, may very well go too far in attempting to regulate private activities. *Supra* note 1. As applied in this case, however, Sawatzky's First Amendment rights were not violated.

[8] We are of the opinion that within the marital relationship the parties to the relationship impliedly consent to sexual solicitations (not sexual acts) and, thus, the City's exception of married persons is entirely reasonable and rationally related to the purposes of the ordinances.

[9] On facts similar to this case the Kentucky Supreme Court found that a statute prohibiting homosexual sodomy was unconstitutional under the Kentucky Constitution. *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). Wasson was actually charged under a statute that made solicitation for any criminal offense unlawful. *Id.* at 488. Although factually similar, *Wasson* is not helpful in this case because it is based solely on Kentucky's Constitution which is substantially different from Oklahoma's Constitution.

AN APPEAL FROM THE MUNICIPAL COURT OF OKLAHOMA CITY

THE HONORABLE EMILY KAYE LONIAN, MUNICIPAL JUDGE

Kenneth B. Sawatzky was convicted of Offering to Engage in an Act of Lewdness (Oklahoma City Municipal Code 1993, Chapter 30, Section 30-152), fined $250.00 and ordered to pay $105.00 in court costs. Sawatzky's Judgment and Sentence for Offering to Engage in an Act of Lewdness is AFFIRMED.

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OPINION BY: CHAPEL, V.P.J.
LUMPKIN, J.: concur
LANE, J.: concur
STRUBHAR, J.: dissent

RA

STRUBHAR, JUDGE: DISSENT

The majority in its opinion has stated that this case is not about the regulation of conduct between consenting adults in the privacy of their bedrooms or about the legal status to be provided to homosexual persons. Rather, it has held that this case is about whether Oklahoma City may legally prohibit public solicitations for private non-commercial acts of sodomy. Under the specific facts of this case, I agree that this limited approach is appropriate. It is with the majority's ensuing analysis that I disagree.

The opinion notes that the sections of the Oklahoma City ordinance under which Appellant was convicted exempt married persons from the definition of lewdness.[1] Accordingly, non-married persons can be convicted of offering to engage in certain acts which are legal for married persons to solicit. It is the reasoning of the majority that it is lawful to distinguish between married persons and non-married persons for purposes of solicitation of lewd acts because such solicitations are a consequence of the marital relationship to

[1] *See* Oklahoma City Municipal Code Sections 30-151 and 30-152.

which its parties have impliedly consented. Although ambiguous, this language seems to imply that dissimilar treatment of married and non-married persons is justified because public solicitation of lewd acts by non-married persons is likely to offend whereas solicitation to participate in lewd acts by married persons to one another is not. Accordingly, the majority seems to indicate that there is a legitimate governmental interest in protecting unmarried persons from offensive solicitations to engage in lewd acts.

Assuming, arguendo, that this is a valid governmental interest, I would note that such situation was not implicated by the facts of this case. The record in this case clearly supports a finding that the language spoken by Appellant which was construed to be an offer to engage in lewd acts was not made under circumstances which could reasonably have been perceived to have been offensive. Rather, as is evinced by the testimony of the arresting officer, Appellant was purposefully led to believe that a sexual solicitation would be welcome. Nothing in this situation indicated that the solicitation was unwelcome or offensive. Although the majority opinion states in footnote 7 that "reasonable prohibitions against soliciting sexual acts do not violate the First Amendment whether the underlying conduct is lawful or unlawful" the municipal ordinance prohibits both invited and offensive solicitations and to this extent, it imposes unreasonable restrictions. Accordingly, I dissent.